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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

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The Interest of the Authors League

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this Petition for Rehearing may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

Summary of Argument

We submit that the principles adopted in the majority opinion denied petitioners their rights of free speech and

press under the First Amendment; and will deny these rights to other authors, publishers and book sellers, in the case of works that would not have been judged obscene under the *Roth* standard prior to March 21, 1966. The reasons for this pessimistic view are set forth in the four dissenting opinions and will not be reiterated here.

In addition, we respectfully submit, the petition for rehearing should be granted, and the convictions reversed, for the following reasons:

1. The new rules adopted in the majority opinion should not be applied retroactively to sustain petitioners' convictions.

2. The "fourth test" added to the *Roth* standard by the majority opinion should be clarified or it will result in a denial of freedom of expression to publishers and sellers of works that are not obscene (under the old or the new standard).

3. Under the rationale of the majority opinion, only the convictions on the counts dealing with advertising should be affirmed; the convictions on the counts dealing with the publications themselves should be reversed. To thus treat separately "offensive" advertising and promotional activities would prevent infringements of the rights of free speech and press with respect to materials which per se are not "obscene".

POINT I

The Revised *Roth* Standard should not be Applied Retroactively to Sustain Petitioners' Conviction.

The previous statements of the *Roth* standard by this Court did not indicate that the methods of selling, advertising or promoting a book, or the nature of its publisher's business, would in any way affect the determination of whether it was, or was not, obscene. On the contrary, the three tests comprising the *Roth* standard related, and by their terms could only relate, to the contents of the book. In fact, the only suggestion that the methods by which, or context in which, a book was sold could effect the issue of its obscenity was made in a manner that clearly indicated it was rejected by the majority of the Court—having been advanced by Chief Justice Warren in his concurring opinion in *Roth* v. *United States,* 354 U.S. 476, 495 and in his dissenting opinion in *Jacobellis* v. *Ohio,* 378 U.S. 184, 201.

Therefore, petitioners did not have any notice that a publisher would be jailed under 18 U.S.C. 1461 for selling publications that did not, of themselves, violate all three phases of the *Roth* standard, as reiterated in *Jacobellis* v. *Ohio* (378 U.S. 184, 191)—because he used advertising materials which, also, did not of themselves violate the three phases of the *Roth* standard. Indeed, it is clear that under the circumstances no lawyer or publisher or author could have divined that a publication which was not of itself "obscene", and advertising materials which were not of themselves "obscene", could be fused so that the publication became "obscene" and punishable under the federal obscenity statute. We therefore respectfully submit

that this new concept should not be applied retroactively to sustain the conviction here.

We are particularly fearful of the example this will set for lower courts. The application of obscenity laws by trial courts has not been uniformly characterized by a zealous concern for defendants' rights of free speech or due process. As Judge Moore noted in *United States* v. *Klaw,* 350 F. 2d 155, 169 ". . . most if not all of the censor's defeats have come at the hands of appellate courts . . .". We respectfully urge that the retroactive application of the concept adopted in this decision will inevitably and logically lead lower courts to assume that this Court has relaxed the principles of fair notice (*Winters* v. *New York,* 333 U.S. 507, 509) and the prohibitions against vagueness in measures restraining freedom of expression (*Smith* v. *California,* 361 U.S. 147, 151; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438) which it has heretofore laid down for them to follow.

POINT II

The Rules Announced in the Majority Opinion Should be Clarified.

In *Jacobellis* v. *Ohio,* Mr. Justice Brennan noted that the application of an obscenity law "requires ascertainment of 'the dim and uncertain line' that often separates obscenity from constitutionally protected expression" (378 U.S. 184, 187). We submit that the concepts adopted by the majority opinion will make the line dimmer and more uncertain, more frequently.

The opinion permits lower courts in certain circumstances to judge a non-obscene work obscene on the basis of advertising and promotional materials (which in themselves are not obscene). It does not clearly formulate, or identify as such, the test which lower courts must use in determining (i) what advertising or promotional materials fall into the condemned category; or (ii) the circumstances in which such materials can be used to hold obscene a work which is not obscene under the old *Roth* test. Moreover, the opinion does not set forth a clear statement of the test to be applied in determining what other factors of exploitation, if any, may be considered in determining that a work which is not in itself obscene may nonetheless be judged obscene under 18 U.S.C. 1461, or other obscenity statutes.

We believe it is essential that the opinion be clarified because it adds to the test of obscenity factors which, even under the clearest of definitions, are bound to produce a far greater number of erroneous determinations of obscenity by lower courts than we have had under the *Roth* standard, pre-1966. (Again, Judge Moore's comment is worth recalling: ". . . most if not all of the censor's defeats have come at the hands of Appellate Courts . . .". 350 F. 2d 155, 169). Injecting these new factors will produce and permit far more subjective judgments as to the obscenity of books than does the question of whether the contents of a book *per se* appeal to prurient interests, or are patently offensive, or lack social importance. (By comparison to the new factors introduced by the majority opinion, the standards of the *Roth* test are objective). But without a definitive statement of the test for determining these new factors, identified as such (as in *Jacobellis* v.

Ohio, 378 U.S. 184, 191), the incidence of erroneous judicial determinations of obscenity (and the consequent denial of First Amendment rights) will proliferate. And the burdens of this Court will increase correspondingly.

We submit that unless the majority opinion is clarified, publishers and book sellers, as well as authors, will not be able to determine in many instances whether it is safe to sell works that would, under the old *Roth* standard, have been deemed forms of "constitutionally protected expression".

In this connection, it is imperative to recall this Court's observation in *Smith* v. *California,* 361 U.S. 147, where the court said,

> "... this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." (p. 151)

Moreover, the need for clarification is urgent because ambiguity and lack of certainty with respect to the new concept, will increase "informal censorship" by "threats of prosecution" which is frequently used to "inhibit the circulation of publications" entitled to constitutional protection (Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 67). The more ambiguous the criteria for obscenity, the easier it becomes for a prosecutor to successfully coerce local bookstores into repressing works he objects to.

In addition, we submit that there are other doubts raised by the majority opinion, which should be resolved.

1. There are statements in the majority opinion which indicate that advertising and promotional materials and activities would only be relevant if the challenged publication came very close to, or bordered on, the line drawn by the *Roth* standard, as announced in *Roth* v. *United States* and *Jacobellis* v. *Ohio;* and that these materials and activities could not be resorted to where a work clearly did not fail to meet the three-phase standard announced in those opinions. The Court said that the evidence of these materials "serves to resolve all ambiguity and doubt" (p. 7) and that "all that will have been determined is that *questionable publications* are obscene in a context that brands them as obscene as that term is defined in *Roth* . . ." (p. 12) (emphasis ours). However, other statements in the opinion might be construed by lower courts as justifying a conviction of obscenity, because of "offensive" (but non-obscene) advertising materials, even though it was clear that the dominant theme of the work, taken as a whole, did not appeal to prurient interest; or that it was not patently offensive; or that it was not utterly without social value.

We urge that the Court make it plain that advertising, promotional and selling activities would only become relevant in cases where there is a serious doubt as to whether a work is protected under the old *Roth* standard.

We also submit that the Court should make it clear that the *Roth* standard has not otherwise been changed. The majority opinion employs various phrases that lower courts and prosecutors erroneously might assume had replaced, modified or supplemented the *Roth* requirements for judging a work itself. Such phrases as "erotically arousing" (p. 7); "sexually provocative aspects" (pp. 7, 9); "instru-

ment of (the) sexual stimulation" (p. 8); "appeal to sexual curiosity and appetite" (p. 8); "appeal to erotic interest" (p. 4); and "titillation by pornography" (pp. 8, 12) might be read as amendments to the *Roth* requirement that "the dominant theme of the material taken as a whole appeals to prurient interest" or the preliminary condition that the material "goes substantially beyond customary limits of candor in description or representation of such matters"; or the ultimate condition that the work must be " 'utterly' without social importance" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 191).

2. The majority opinion states that "the fact that each of these publications was *created or* exploited entirely on the basis of its appeal to prurient interests strengthens the conclusions that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter." (p. 11) (emphasis ours).

We fear that this language may be read as permitting courts to determine, from the work or otherwise, that the purpose of the creator—the author—was to appeal to prurient interest, even though the work was not obscene under the old *Roth* standard. We respectfully urge that it be made clear that such an inquiry is not permitted. Inquiry into a matter so elusive and subjective as an author's "intent" would fling open the door to wholesale suppression of works entitled to the protection of the First Amendment. We submit that a bookseller should not have to prove that the author of ULYSSEES, or LADY CHATTERLY'S LOVER, or TROPIC OF CANCER, or FANNY HILL had not "created" such a work "entirely on the basis of its appeal to prurient interests", in order to defend his right to sell it.

3. In this case, the petitioners alone published, promoted and advertised the publications on trial, and sold them directly to readers. But a book is sold through several distributors and wholesalers, and many book stores. And frequently a book is published concurrently by more than one publisher. For example, a novel may be published by one publisher in the original hard cover edition, by one or more other publishers in paperback editions, and by other publishers in hard cover reprint editions, digests, or anthologies.

One of these publishers, or distributors, or bookstores might employ advertising or promotional activities with respect to the book that could be held "offensive" under the majority opinion, or might be engaged in a business that could be adjudged as "pandering" under the opinion. Such conduct should certainly not be attributed to others engaged in publishing, selling or distributing a work that is not obscene under the old *Roth* standard. We urge that the Court make this clear.

Otherwise, the author of a non-obscene book could be denied his freedom of speech and press (through total suppression of his book) because of advertising or promotion conducted by one wholesaler or book store, or by one of several publishers. Or, a publisher could be prevented from selling the book because of advertising done by another publisher, a distributor, or book store. Or one book store could be prohibited from selling the book because of advertising done by another book store or distributor or publisher. We urge that the Court make it plain that where advertising or promotional activities can, under its opinion, be applied to determine the issue of obscenity—

such activities can only be attributed to the person or party who has engaged in them, and cannot be attributed to the book itself, so as to prevent its publication or sale by others who have not engaged in such "offensive" activities. (The same problems would be created if one exhibitor's or distributor's "offensive" advertising of a motion picture could be attributed to the producer, or other distributors or exhibitors).

POINT III

Under the Rationale of the Majority Opinion, Only the Convictions on the Counts Relating to Advertising Should Have Been Sustained.

Petitioners were charged with violating the statute by two separate categories of acts: (i) The advertising of their publications; and (ii) the sale of the publications themselves. We submit that each category of acts should have been judged separately and under the rationale of the majority opinion, only the convictions on the counts dealing with advertising should have been sustained.

It would appear that without petitioners' advertising and promotional activities, their publications, standing alone, were not obscene under the *Roth* standard. The majority opinion assumed that the publications on trial "cannot themselves be adjudged obscene in the abstract" (p. 11). Presumably, if petitioners had not engaged in the advertising, promotional or selling activities condemned in the opinion, and had only sold the publications by use of simple subscription forms, the convictions would have been reversed.

It is equally clear that petitioners' advertising materials provided the offensive element which resulted in the affirmance of their convictions. The majority opinion holds that the advertising

> ". . . tend(ed) to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." (p. 7)

We submit that it is the advertising, and not the publications themselves, that perpetrated this offense of "public confrontation".* It is clear that because the advertising was so "brazen" and explicit, those who were "offended" by such publications would not have purchased the publications themselves; and only those who were not offended by the nature of the publications were likely to purchase them. Moreover, it is obvious that only a small proportion of those who received the petitioners' advertising actually purchased the publications.

The majority opinion is based on the premise that the advertising supplied the elements necessary to render obscene publications that were assumed not to be "obscene in the abstract". It said that:

> "The deliberate representation (in the advertising) of petitioners' publications as erotically arous-

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* In its original brief, the Authors League submitted that the dissemination of obscene materials by means which forced them on unwilling readers and invaded their right of privacy could be prohibited. As Mr. Justice Stewart noted, "Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it" (p. 2).

ing, for example, stimulated the reader to accept them as obscene."

But it is highly unlikely that in the weeks that elapsed between reading the advertising and receiving the publications, any reader would have retained so vivid an impression or titillating effect from the advertising, as to condition responses to the publications that would not have been stimulated by reading the publications alone without knowledge of the advertising. Moreover, advertising could not change one iota the social importance of a work; or its patent offensiveness. (And petitioners tasteless efforts to secure mailing addresses, undisclosed to the public, could not affect the impact of the publications upon readers.)

If petitioners are guilty of any offense under the statute, it is the offense of disseminating objectionable advertising materials to the public. And we urge that such conduct does not warrant sustaining their convictions on counts relating to the sale of publications which "cannot themselves be adjudged obscene in the abstract".

The majority opinion, in a footnote reference (p. 2), suggests that since the government conceded that the advertising material was not itself obscene, convictions on the counts for mailing advertising could stand only if the publications themselves violated the statute. However, petitioners were charged and convicted with sending circulars which advertised where obscene publications might be obtained. And, Circuit Courts of Appeals have recently sustained conviction of that offense even though neither the advertising nor the publications were obscene, because the advertising represented the publications to be obscene.

In *United States* v. *Hornick,* 229 F. 2d 120, the Court said:

> "As we have already said, information as to where such obscene matter can be obtained shouts loudly from the words used by the advertising of the defendants. We do not think it is necessary that representations made in these advertisements be true. The statute says 'advertisement * * * giving information.' The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape." (at p. 121)

See also:

United States v. *Perkins,* 286 F. 2d 150.

We submit that "objectionable" advertising materials and activities should be dealt with separately from the publications themselves. This would prevent restrictions from being imposed on the rights of free speech and press of authors, publishers, and booksellers with respect to works which per se are not obscene.

CONCLUSION

It is respectfully submitted that the Petitions for Rehearing should be granted and that the convictions should be reversed.

Respectfully submitted,

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